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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 211 and 212

METROMEDIA, INC.,

Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

METROMEDIA, INC.,

Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS and UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITIONER'S REPLY BRIEF IN NO. 211

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTIONS TO DISMISS OR AFFIRM IN NO. 212

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The Real Issue

The issue really posed by this case is whether an adjudicated monopolist, operating under the compulsory licensing provisions of an antitrust decree, may perpetuate the anticompetitive practice of forcing a single form of license of its own devising upon all radio stations.

The licensing fee arrangement sought by Metromedia is concededly "within the terms of the amended judgment" (Opinion below, Pet. A-7); no one challenges the reasonableness of the form of license sought by Metromedia. The sole basis for ASCAP's refusal to quote a fee for the kind of license sought by Metromedia is ASCAP's unwillingness to issue "different forms of license" (R. Vol. I, p. 31a) and its claim that the decree requires that an ASCAP license "has got to be uniform for all local stations" (R. Vol. II, p. 17a). Despite the absence of any factual issues, ASCAP having conceded that this case only involves "a matter of law" (R. Vol. II, p. 3a), the question of Metromedia's entitlement to a reasonable license within the terms of the decree remains unanswered.

Respondents have not met the substantial issue, claiming it is raised by the wrong party in the wrong proceeding. ASCAP's position here is belied by its own contradictory arguments elsewhere. The government's position here is undermined by its own concessions.

ASCAP's Bad Faith

The bad faith of ASCAP is revealed by a comparison of its argument to this Court and its argument to the District Court in another proceeding now pending under the same Amended Judgment. In its brief to this Court (pp. 11-12) ASCAP argues that Metromedia—in its endeavor to secure a form of license suited to its needs—has a complete remedy under Section IX of the Amended Final Judgment:

> "Particularly is the result reached by the Court of Appeals sound where the Amended Final Judgment grants a remedy to would-be users of ASCAP music—the right to apply under Section IX to the District Court for determination of a reasonable license fee. Both Chief Judge Ryan and the Court of Appeals recognized that a denial of petitioner's motion did not leave petitioner remediless.
>
> "It is precisely because petitioner has an explicit remedy under Section IX of the Amended Final Judgment that this case does *not* raise the issue of the denial of enforcement rights to private parties who are beneficiaries of civil antitrust decrees entered in Government actions."

In a Section IX rate proceeding now pending in the District Court for a television license, ASCAP argues that the form of license is not litigable. ASCAP's Memorandum in Response to Petitioner's "Tentative Statement of Issues," February 10, 1965, in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, Civil Action No. 13-95, states:

"The only issue for the Court to decide in this proceeding, as Section IX of the Amended Final Judgment makes crystal clear, is what is 'a reasonable fee' for the blanket and per program licenses which television stations have sought and obtained from the Society for over 15 years.

"The pleadings raise no other issue. Indeed, no other issue could be raised in a proceeding brought under Section IX of the Amended Final Judgment. (p. 2)

* * * *

"Moreover, under Section IX of the Amended Final Judgment, the Court is required only to make a determination as to 'a reasonable fee'. The Court is not required to rewrite the many provisions of the ASCAP blanket and per program licenses that relate to matters other than the reasonableness of the fee." (p. 7)

Thus, in this Court ASCAP argues that review should be denied because the licensee has an adequate remedy in the District Court under Section IX to obtain an authorized but different form of license. In the District Court, ASCAP argues that a licensee has no such remedy.

ASCAP also attributes to Metromedia an argument it has never made, viz., that ASCAP must "grant every user his own special license" (ASCAP Br., p. 13). Metromedia's argument is simply that absent any issue over the reasonableness and propriety of the blanket license sought by it, ASCAP must quote a fee thereon. ASCAP's reluctance to grant Metromedia a different form of license stems from ASCAP's unwillingness to permit radio stations to have a choice

of licenses. (R. Vol. I, p. 31a). However, as this Court said in *United States* v. *Paramount Pictures*, 334 U.S. 131, 159 (1948):

> "But the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest, in a practice which contravenes the policy of the antitrust laws, receive judicial sanction."

This is a Section IX Proceeding

Both ASCAP and the United States argue that Section IX of the Amended Judgment affords Metromedia an adequate remedy which it has not pursued. The fact is that Metromedia *is* proceeding under Section IX.

As the record demonstrates, Metromedia's request to ASCAP stated: "The within application is made pursuant to Section IX of the amended final judgment . . ." (R. Vol. I, p. 65a). The government concedes that Section IX of the Amended Judgment requires ASCAP to advise the applicant of the fee which ASCAP deems reasonable "for the license requested" (U.S. Br., p. 3). The government then notes that if the parties are unable to negotiate a mutually agreeable fee within 60 days thereafter, the applicant may petition the District Court for the determination of a reasonable fee in which proceeding ASCAP has the burden of establishing the reasonableness of the fee it seeks to charge (U.S. Br., p. 4).

The government also concedes that Metromedia is one of the "beneficiaries of the consent decree" (U.S.

Br., p. 7), and that the controversy as to whether ASCAP must issue the type of license sought "is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned" (U.S. Br., p. 9).

Finally, in its statement of the Question Presented, the government concedes that Metromedia may enforce the judgment against the defendant, but in "a different district court procedure" (U.S. Br., p. 3).

When ASCAP refused to quote, as required by Section IX, claiming that it did not have to issue "different forms of license," Metromedia made this motion, expressly pursuant to Section IX, to procure a determination of ASCAP's duty to comply with Section IX and quote a fee (R. Vol. I, pp. 21a-22a, 24a-25a).

The motion was not an attempt to usurp the government's prerogative of initiating contempt proceedings for enforcement of the decree. Rather, it was simply a procedure to secure the right specifically conferred upon an applicant to the quotation of a fee on a form of license authorized by the decree. The distinction is vital. Metromedia concedes that it could not maintain contempt proceedings for a violation by ASCAP of one of the general injunctions of the Amended Judgment. Thus, if ASCAP flouted a provision of Section IV(A)-(H), Metromedia would have to accept the government's action or inaction. However, when Metromedia initiates a Section IX proceeding, which is "entirely between private parties," Metromedia may compel ASCAP to follow the route marked out by Section IX.

Apparently, the government and ASCAP contend that a Section IX proceeding is not initiated until a petition has been filed in the District Court for the determination of a reasonable fee. Such a reading of the decree ignores the expressly required prior steps of quotation and negotiation, as well as the provision casting upon ASCAP the burden of establishing the reasonableness of a fee theretofore quoted by it.

Conclusion

Again we emphasize that the only real issue is whether ASCAP may dictate the terms of its licenses. If ASCAP can dictate the terms of its licenses with complete disregard for the needs of the licensee, then the Amended Judgment does not curb the ASCAP monopoly; it furthers it.

Respectfully submitted,

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